No. 22,106

IN THE

United States Court of Appeals

For the Ninth Circuit

CASA DORINDA ESTATES, also known as SANTA MARIA ACRES APARTMENTS, a copartnership, et al., Debtor,

Appellant,

vs.

ALL-YEAR WEATHER, INC.,

Appellee.

On Appeal from the United States District Court for the Central District of California

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from an order entered on May 26, 1967 by the United States District Court for the Central District of California reversing the order of the Referee in Bankruptcy dated January 23, 1967, wherein appellee was restrained until further order of the Court, or until the final decree in the Chapter XI proceedings, from proceedings to foreclose its lien on appellant's property. The appellant, Casa Dorinda Estates, also known as Santa Maria Acres Apartments, a copartnership, initiated the above entitled

proceedings for an arrangement under Chapter XI of the Act of Congress Relating to Bankruptcy, 11 U.S.C. Sections 701-799, by filing its petition and schedules in said United States District Court on December 20, 1966. The Referee in Bankruptcy to whom said proceedings was referred by said Court issued on said date of December 20, 1966, upon appellant filing a petition therefor, an order to show cause to appellee and a number of other respondents directing them to appear before said Referee and establish the amount, validity, and priority of their respective liens upon appellant's property, and to show why, inter alia, they should not be restrained from commencing or proceeding any further with any foreclosure of their liens on appellant's property (C.T. pp. 2-13.) The said petition of appellant and the order to show cause issued thereon was duly noticed and heard by the Referee who made and entered findings of fact, conclusions of law, and an order on January 23, 1967 (C.T. pp. 25-31). Said order contained a provision restraining appellee and said other respondents from proceeding to foreclose on appellant's property. Appellee alone filed a petition to review said order of the Referee on February 2, 1967 (C.T. pp. 33-35). The petition to review was heard by the Honorable Charles H. Carr, Judge of said District Court, who made and entered an order on May 26, 1967, wherein that portion of the Referee's order restraining appellee was reversed (C.T. pp. 56-57). Appellant filed in this Court a timely notice of appeal from said order on June 28, 1967

(C.T. pp. 58-59). The jurisdiction of said District Court to entertain said Chapter XI proceedings, rests upon 11 U.S.C. Sections 701-799. The jurisdiction of the District Court to review the said order of the Referee rests upon 11 U.S.C. Sec. 67(a)(8). The jurisdiction of this Court to hear this appeal is based upon 11 U.S.C. Sections 47, 48 and 716 and General Order No. 36.

STATEMENT OF THE CASE

This appeal arises in a proceedings in bankruptcy wherein appellant, as debtor-in-possession under 11 U.S.C. Sections 742 and 743, filed a petition and had an order to show cause issue seeking to temporarily restrain its secured creditors from foreclosing on its real property, thereby giving it a reasonable time to realize upon its substantial equity in its said property and pay its secured and unsecured creditors in full and retain the excess for its own benefit and rehabilitation.

STATEMENT OF FACTS

Appellant is a partnership composed of Charles B. Herter, Jr., Evelyn F. Herter, Homer F. Barnes and Mary F. Barnes (R.T. 1/5/67, p. 11, Ex. E; R.T. 12/27/66, p. 80, lines 4-9).

The partnership acquired two contiguous parcels of real property consisting of approximately fifty

(50) acres in Montecito, California, a suburb of Santa Barbara, and had title thereto recorded in the names of Homer F. Barnes and Mary F. Barnes. On April 20, 1964 a deed of said property from the two Barnes to Charles B. Herter, Jr. and Evelyn Herter was recorded. (Ex. 6, R.T. 12/27/66, p. 42). On March 1, 1965, at a time when the record title was in the Herters' names, the Herters gave appellee, All-Year Weather, Inc., a deed of trust upon both of said parcels of real property (Ex. 3, R.T. 12/27/66 p. 35). Later the Herters redeeded the said real property to the Barnes who, in turn, deeded the property to the Security Title & Trust Company as trustee (Ex. 7, Ex. 1, R.T. 12/27/66 p. 23 line 5 to p. 24, line 8, Ex. 4). The Security Title and Trust Company held legal title to said real property as trustee for the partnership (Ex. 1, R.T. 12/27/66 p. 23, line 20 et seq. Ex. 4, C.T. p. 28, lines 7-17; C.T. p. 30, lines 25-28).

At all times since the acquisition of the property in the names of the various partners the appellant, as a partnership, was the owner of the beneficial interest therein. (R.T. 12/27/66 p. 95, lines 15-22; p. 100, lines 21-24; p. 88, line 22; p. 80, line 19; R.T. 1/5/67, p. 12, lines 3-10; p. 28, lines 18-21; C.T. p. 28, lines 2-6; p. 30, lines 1-5). At the time the debtor proceedings was originally filed in the District Court appellant had, and still has, possession of said real property (R.T. 12/27/66 p. 88, line 21-p. 89, line 7).

The real property is located in an exclusive residential area and is studded with black oak and is a fine piece of subdivision land (R.T. 12/27/66, p. 81, line 6; p. 83, line 7; Ex. A-D). Both parcels have a total value of $1,115,000.00 (R.T. 12/27/66 p. 83, lines 13-26). A portion of the property was previously sold by appellant for more than $24,000.00 per acre (R.T. 12/27/66, p. 87, lines 15-22). There now remains a fraction of an acre less than 50 acres (R.T. 12/27/66, p. 83, lines 19-23). The total of all liens against both parcels of real property is less than $450,000.00 (R.T. 12/27/66, p. 90, lines 10-23). Appellant has an equity of $665,000.00 in said real property (C.T. 12/27/66, p. 28, lines 18-25).

At the hearing upon appellant's petition and order to show cause before the Referee the attorney for appellee, All-Year Weather, Inc., made a conditional offer to deposit with the Referee a sum in the amount of $7,177.14 to be used to pay appellant's unsecured creditors. Such offer was expressly conditioned upon (1) the Court's dissolution of the temporary restraining order, (2) that no further stay be issued, (3) that no determination be made whether or not appellant was the owner of the real property, (4) that no determination be made whether the temporary restraining order legally stayed the lienholders' enforcement of their liens, (5) that the advance of the sum of $7,177.14 be considered an additional advance under appellee's trust deed, (6) that said advance be without prejudice to appellee's objection to jurisdic-

tion and to the granting of a stay order (R.T. 12/27/66, p. 6, line 4-p. 7, line 7). During said hearing before the Referee said attorney stated that dismissal of the Chapter XI proceedings was not a condition of his said offer (R.T. 12/27/66, p. 16, lines 18-20; p. 17, lines 12-13).

Upon the conclusion of the hearing, upon appellant's petition and the order to show cause the Referee made findings of fact (1) that appellant was a partnership, (2) that it was, and is, the owner of the real property, and (3) that the property has a value of $1,115,000.00, and that the total of all liens upon the property, including real property taxes, is less than $450,000.00 (C.T. p. 28, line 22).

At the hearing upon review before the District Court no further evidence was received. However, said District Court did purport to make findings of fact and entered them in the proceedings (C.T. pp. 52-54).

At the said hearing before the District Court upon the petition to review the Referee's order, appellee's attorney stated he had made an offer to pay all unsecured debts and made further statement at said hearing upon review that appellee would also pay the costs of administration (R.T. 5/1/67, p. 19, lines 10-15). The order signed and entered by the District Court provides that the Chapter XI proceedings shall be dismissed upon payment by appellee into Court of an amount sufficient to pay appellant's unsecured debts and the costs of administration (C.T. p. 57, lines 19-27).

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in reversing the Referee's order restraining appellee from foreclosing on appellant's property.

2. The District Court erred in ordering the Referee to fix the reasonable costs of administration and to permit appellee to pay such costs, together with the sum of $7,177.14, and to thereupon dismiss the proceedings.

QUESTIONS PRESENTED

1. Were the findings of fact, conclusions of law and order of the Referee clearly erroneous?

2. Did the Referee clearly abuse his discretion in granting the restraining order?

3. Whether the rehabilitation of the debtor is included among the purposes of a proceeding for an arrangement under Chapter XI of the Act of Congress Relating to Bankruptcy?

4. Whether a proceedings for an arrangement under Chapter XI must be dismissed as a matter of law, or at all, if a secured creditor, who stands to forfeit a substantial equity in the debtor's property, offers to deposit an amount in Court sufficient to pay the costs of administration and debtor's unsecured creditors?

5. Does Section 323 of the Act of Congress Relating to Bankruptcy require a statement in a petition

filed by a partnership under Chapter XI that it and its individual partners are unable to pay the partnership debts as they mature?

SUMMARY OF ARGUMENT

The appellant, Casa Dorinda Estates, a copartnership, owned and was in possession of the real property involved before and at the time these proceedings were filed in the Bankruptcy Court. The Referee, sitting as the Bankruptcy Court, had jurisdiction to determine ownership of the property, the amount and validity of any and all liens thereon and upon notice and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon the property of the debtor. The granting or denying a petition for a restraining order is a matter that lies within the sound discretion of the Referee. Any order of a Referee upon a matter that lies in his discretion should not be reversed unless it is clearly erroneous and is an abuse of such discretion. The Referee's order is fully supported by findings of fact and conclusions of law that are based upon substantial uncontradicted evidence.

The fact that the Debtor is the owner of the property and has an equity therein of $665,000.00 over and above all liens, including that of appellee, is clearly established by said findings of fact and substantial uncontradicted evidence.

The purpose and intent of a Chapter XI proceedings is to rehabilitate the debtor and to preserve the equities that the debtor may have in its property for the benefit of the debtor as well as to provide for the payment of creditors. "Providing a means of relief and rehabilitation to debtors is the common principal purpose of Chapters X, XI, XII and XIII of the Bankruptcy Act." (*Hallenbeck v. Penn Mutual Life Ins. Co.,* 4 Cir., 323 F. 2d 566, 570). The payment of creditors is not the sole purpose of the chapter. The jurisdiction and powers granted the Bankruptcy Court by Chapter XI may be utilized to rehabilitate the debtor and preserve its equities in its properties for its benefit, provided that all the elements for such a proceeding under that Chapter were present at the time of the original filing of the proceedings in the Court.

Debtor respectfully submits that the findings of fact and conclusions of law made by the Referee are supported by substantial evidence, are not clearly erroneous and that the Referee's order restraining appellee from proceeding to foreclose upon debtor's property was not an abuse of his discretion.

ARGUMENT

A. THE DISTRICT COURT ERRED IN REVERSING THE REFEREE'S ORDER RESTRAINING APPELLANT FROM COMMENCING FORECLOSURE PROCEEDINGS.

1. The Bankruptcy Court has jurisdiction of Debtor and its property.

Appellant is a copartnership and as a copartnership it owned the real property involved in these proceedings. A copartnership may own real property although legal title may stand of record in the names of individual partners.

In 37 *Cal. Jur.* (2d), at page 597, it is stated:

> "Real property may be owned by a partnership though the title is in the individual names of the partners."

In 37 *Cal. Jur.* (2d), at page 593, it is stated:

> "The Uniform Partnership Act provides that all property originally brought into the partnership, or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property. It further provides that, unless the contrary intention appears, property acquired with partnership funds is partnership property. This result follows, moreover, in spite of the fact the property may be bought in the individual names of the partners. Nor is it necessary to show that partnership property was purchased with partnership funds. Lands standing in the name of an individual partner may have been contributed by him as his portion of the firm assets."

Accord:

Swarthout v. Gentry, 62 C.A. (2d) 68;
Bennett v. Bumb, 51 Cal. (2d) 294.

The evidence in this matter that appellant is the owner of the property is uncontradicted (R.T. 12/27/66, p. 95, lines 15-22; p. 100, lines 21-24; p. 80, line 19; R.T. 1/5/67, p. 12, lines 3-10; p. 28, lines 18-21). Athough the record title at the time these proceedings were originally filed stood in the name of Security Title and Trust Company, Trustee, the evidence is uncontroverted that said company held legal title in trust for the partnership (Ex. 1; R.T. 12/27/66, p. 23, line 10 et seq.). An order has been made and entered upon due notice to said company that said real property is the property of appellant (C.T. p. 28, lines 7-17; p. 30, lines 25-28). There is more than substantial evidence in the record to support these findings and said order.

Appellant was in possession of the real property when the proceedings under Chapter XI was filed (R.T. 12/27/66, p. 88, line 21; p. 89, line 7). The Bankruptcy Court has exclusive jurisdiction over every debtor and its property in every Chapter XI proceedings.

11 *U.S.C.* 711, provides:

> "Where not inconsistent with the provisions of this chapter, the Court in which the petition is filed shall for the purpose of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

The Referee, sitting as the Bankruptcy Court, also had jurisdiction, upon notice and for cause shown, to restrain any commencement or continuation of any foreclosure proceedings upon appellant's property.

11 *U.S.C.* 714, provides in part:

> "The Court may . . . upon notice and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceedings to enforce any lien upon the property of a debtor."

The Referee did, upon notice and for cause shown, enjoin further foreclosure proceedings.

2. The granting or denying a petition or application for a restraining order is a matter that lies within the discretion of the Referee.

In 8 *Collier on Bankruptcy,* 14th Ed. Sec. 3.20(3), at page 254, it is stated:

> "The granting or withholding of an injunction is left to the discretion of the Court."

In 9 *Remington on Bankruptcy,* at page 223, it is stated:

> "From the foregoing it is obvious that the courts exercised a considerable amount of discretion as to issuance or denial of injunctions or stay orders in connection with Section 74 proceedings, and from the purpose and language of Section 314 it would seem to be clear that at least the same amount of discretion rests in the court in a Chapter XI proceedings."

In *Continental Illinois Natl. Bk. v. Chicago Rock Island & Pac. Ry. Co.,* 294 U.S. 648, 680, 55 S. Ct. 595, 79 L. Ed. 1110, 1127, at page 1129, it is stated:

> "A claim that injurious consequences will result to the pledgee or mortgagee may not, of course, be disregarded by the district court; but it presents a question addressed not to the power of the Court but to its *discretion* (emphasis added) . . . a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised."

And at page 1131:

> "The injunction here goes no further than to delay the enforcement of the contract. It affects only the remedy."

3. The Referee did not abuse his discretion in granting the restraining order.

Upon an appeal from or review of a Referee's order his order is to be affirmed unless it appears that his findings of fact, conclusions of law, or order is clearly erroneous, or that he has clearly abused his discretion in granting the order. The power of a District Court upon review of a Referee's order is identical with that of an Appellate Court upon an appeal.

In *Lines v. Falstaff Brewing Co.,* 9 Cir., 233 F. 2d 927, at page 930, it is stated:

> "General Order in Bankruptcy No. 47, 11 U.S.C.A. following section 53, reads as follows:
>
> 'Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and

conclusions of law, *and the judge shall accept his findings of fact unless clearly erroneous* (Court's emphasis) . . ., . . . Similarly, this court may not set aside the findings of the referee unless they are clearly erroneous.' "

At page 932:

"At this juncture it might be well to pause and reflect upon the precise meaning of 'discretion' —a convenient expression frequently used, but not often defined. In *Delno v. Market St. Ry. Co.,* 9 Cir. 1942, 124 F. 2d 965, 967, this Court thus expatiated on the subject:

'In a second sense, and the one most commonly meant in the use of the word in the law, "discretion" is defined as: "The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court." 1 *Bouv. Law Dict., Rawles Third Revision,* p. 884. Judicial action—discretionary in that sense—is said to be final and cannot be set aside on appeal except when there is an abuse of discretion. A common example is a court's ruling on the extent of cross-examination. Discretion in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused ONLY (Court's emphasis) where no reasonable man would take the view adopted by the trial court. *If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.*' (Court's emphasis) *Since the pow-*

er of review entrusted to a District Court vis-a-vis the findings of a referee is identical with that of a court of appeals with respect to the findings of a District Court (emphasis added) the above excerpt is apposite here. In each case, the findings are not to be set aside unless clearly erroneous."

Accord:

Snider v. England, 9 Cir., 374 F. 2d 717;
Lundgren v. Freeman, 9 Cir., 307 F. 2d 104.

Rule 52(a) *Federal Rules of Civil Procedure* provides in part:

"Findings of fact shall not be set aside unless clearly erroneous . . . ."

General Order No. 47 of *General Orders in Bankruptcy* provides in part:

"Unless otherwise directed in the order of reference the report of a referee . . . shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous."

The Referee may, in his discretion issue an order enjoining the enforcement or foreclosure of a lien to protect and preserve an equity in a debtor's property for *the benefit of the debtor* as well as the creditors of the debtor's estate.

In *In re Brown,* 7 Cir., 84 F. (2d) 433, at page 434, it is stated:

"A court of equity, however, has the power to enjoin the holders thereof from an immediate sale, *if such sale will operate to the injury of the*

DEBTOR (all emphasis added) as well as to other creditors. This power is given the Court upon the theory that there may be an *equity* (emphasis added) in the pledged security over and above the amount of the indebtedness secured thereby, and *that such equity will inure to the benefit of the debtor and of his other creditors.* (emphasis added)"

4. The Rehabilitation of a debtor is a primary purpose of a Proceedings under Chapter XI.

The payment of creditors is not the sole purpose of a proceeding for an arrangement under Chapter XI of the Act of Congress Relating to Bankruptcy. The ultimate goal of the proceedings is the rehabilitation and continued existence of the debtor as well as payment of creditors. A Referee may, in his discretion, issue an order restraining enforcement of liens to accomplish this purpose.

In *Nicholas v. United States* (1966), 384 U.S. 678, 86 S.Ct. 1674, 16 L. Ed. 2d 853, at page 861, it is stated:

"The allowance of interest on Chapter XI debts until the filing of a petition in bankruptcy promotes the availability of capital to a debtor in possession and enhances the likelihood of achieving *the goal of the proceeding, the ultimate rehabilitation of the Debtor.*" (emphasis added)

In *In re International Swimming Pool Corp.,* 186 F. Supp. 63, at page 66, it is stated:

"The purpose of a proceeding under Chapter XI is to give the debtor a reasonable opportunity to rehabilitate itself despite the fact that some

losses may be sustained in the transitional period."

In *Hallenbeck v. Penn Mutual Life Ins. Co.,* 4 Cir., 323 F. 2d 566, at 570, it is stated:

"Further, Section 614 of the Bankruptcy Act (11 U.S.C.A., Section 1014) specifically provides that, 'upon notice and for cause shown', the court may enjoin or stay 'any proceedings to enforce any lien upon the property of the debtor.' These provisions not only authorize, but *require* (emphasis added) that the court retain jurisdiction of any property, including, if such there be, *an equity of redemption in real estate for the benefit of the estate of the debtor under Chapter XIII.* (emphasis added) . . . Providing a means of relief and *rehabilitation to debtors* (emphasis added) is the common *principal purpose* (emphasis added) of Chapters X, XI, XII, and XIII of the Bankruptcy Act. Examination and comparison of the structures and specific provisions of these chapters reveal many similarities."

And at page 571:

"Notwithstanding the fact that Chapter XI pertains exclusively to *unsecured* (court's emphasis) debts, it has been held repeatedly that the bankruptcy court, acting by and through the Referee, has the discretionary power to enjoin proceedings to foreclose deed of trust or mortgage liens upon both real and personal property belonging to the debtor. In addition to recognizing and giving effect to the plain provisions of the statute granting the injunctive power, *the rationale of such decisions is that the legislation is remedial in*

nature; it should be liberally construed to effect its purpose: i.e., relief to and REHABILITATION of debtors; (all emphasis added) and it is quite apparent that in certain instances the power to enjoin foreclosure proceedings may properly be used to further that purpose. . . . we hold that the statutes comprising Chapters X, XI, XII and XIII of the Bankruptcy Act are in pari materia and that the constructions so uniformly given to Sections 311 and 314 of Chapter XI should be equally applicable to Sections 611 and 614 of Chapter XIII of the Act."

Accord:

Continental Illinois Natl. Bk. v. Chicago Rock Island & Pac. Ry. Co. (supra), 294 U.S. 648, 680; 55 S. Ct. 595; 79 L.Ed. 1110.

5. It is not required that the proceedings under Chapter XI be dismissed upon the payment into Court of an amount sufficient to pay unsecured creditors and costs of administration.

As hereinabove set forth, the payment to creditors is not the sole primary purpose of a proceedings under Chapter XI. The proceedings can also serve to rehabilitate the debtor and thereby permit it to remain in existence as a member of the business community. A debtor is entitled to all the benefits of the provisions of Chapter XI if it was qualified to file a proceeding under said Chapter as of the time the proceedings were originally filed. Any person, including partnerships, who could become a bankrupt, is entitled to file a proceedings under Chapter XI of the Bankruptcy Act.

6. A partnership may file a Chapter XI proceedings and there is no requirement of a statement that it and its partners are unable to pay the partnership debts as they mature.

11 *U.S.C.* 706 provides in part:

"For the purposes of this Chapter (XI), unless inconsistent with the contest . . . (3) 'debtor' shall mean a person who could become a bankrupt under Section 4 of this Act and who files a petition under this chapter; . . ."

In 1 *Collier on Bankruptcy,* 14th Ed. Sec. 4.12, at page 607, it is stated:

"A partnership is a 'person' with the definition of that term as contained in Sec. 1(23), and hence comes clearly within the voluntary provisions of Sec. 4."

11 *U.S.C.* 722 provides:

"If no bankruptcy proceedings is pending, a debtor may file an original petition under this chapter with the court which would have jurisdiction of a petition for his adjudication."

11 *U.S.C.* 723 provides:

"A petition filed under this chapter shall state that the *debtor* (emphasis added) is insolvent or unable to pay his debts as they mature, and shall set forth the provisions of the arrangement proposed by him, or, that he intends to propose an arrangement pursuant to the provisions of this chapter."

For the purposes of a Chapter XI proceedings a partnership, as such, is fully qualified as a "debtor" separate and apart from its partners. A partnership

alone may file a proceedings for an arrangement under said Chapter and for this purpose it is considered as a complete separate legal entity separate and apart from its partners. In such proceedings only its debts, its assets, and *its* ability to pay its debts as they mature will be considered. It is immaterial whether or not the individual partners also file proceedings for an arrangement of their individual obligations.

In 8 *Collier on Bankruptcy,* Sec. 4.02 (4), at page 365, it is stated:

> "A partnership may file a petition for relief under Chapter XI."

At page 366:

> "A partnership may file a Chapter XI petition in its *separate* (emphasis added) behalf. In proceedings under Chapters I to VII, a partnership may be adjudged a bankrupt either separately or jointly with one or more of all of its general partners. Since a partnership may become a bankrupt alone, it may therefore file a Chapter XI petition alone, and it is immaterial that the partners do not file a petition proposing an arrangement for their individual debts. In many situations, *including this* (emphasis added), a partnership is in bankruptcy a *legal entity* (emphasis added) apart from its individual members . . ."

Since a partnership may file a proceedings under Chapter XI as a separate legal entity apart from its individual members, only the inability of the partnership to pay its debts as they mature is germane to

its proceedings under Chapter XI. It is immaterial whether or not the individual partners had the ability to pay the partnership debts as they matured.

B. THE DISTRICT COURT ERRED IN ORDERING THE REFEREE TO DETERMINE THE COSTS OF ADMINISTRATION AND TO PERMIT APPELLEE TO PAY THIS SUM, TOGETHER WITH FUNDS TO PAY UNSECURED CREDITORS, AND THEREUPON DISMISS THE PROCEEDINGS.

1. Appellant should not be deprived of the benefits of Chapter XI.

As stated, a primary purpose of a Chapter XI proceedings is to rehabilitate the debtor, thereby greatly benefiting the debtor. Appellant was fully qualified as a debtor under the chapter as of the date of filing these proceedings and at all times since. Appellant is entitled to receive the rehabilitation benefits of a Chapter XI proceedings. It should not be deprived of this benefit by the offer of an excessively secured creditor to loan or advance it sufficient money to pay unsecured creditors and costs of administration upon condition that the secured creditor be left free to foreclose upon the very substantial equity in appellant's property.

2. Appellee will suffer no substantial injury if the order restraining its foreclosure is continued in effect.

There is substantial corroborated uncontroverted evidence in the record supporting the Referee's finding to the effect appellant has an equity of $665,000.00 in its real property (R.T. 12/27/66 p. 83, lines 19-26; p. 85, lines 14-24; p. 86, lines 3-26; p. 87, lines 12-22;

p. 90, lines 20-24; C.T. p. 28, lines 18-23). The only detriment that will accrue to appellee by virtue of the stay order is the accrual of interest on the secured debts and taxes on the property, which would reduce appellant's equity in its property. If such stay order was continued in effect over an extended period of time it is possible that at some point appellee would no longer be fully secured. Interest is accruing on the secured indebtedness at the rate of approximately $2,000.00 per month (R.T. 12/27/66 p. 5, lines 2-9; p. 4, lines 11-24; R.T. 1/5/67 p. 2, line 3). Appellant is receiving income from the property of approximately $1400.00 per month (R.T. 12/27/66 p. 64, lines 19-24). This income should offset a substantial portion of, if not all, taxes accruing on the property. There is no evidence in the record as to the amount of the yearly taxes. But even assuming that an additional amount of taxes of $1000.00 per month is accruing this would make a total monthly amount of $3000.00 per month of interest and taxes accruing. Appellant has an equity of $665,000.00 in its property over and above all liens and taxes presently owed. Therefore appellee will be fully secured for more than 200 months, or 16 years. Appellant is requesting a restraining order only for a miniscule part of this period. Since the equity in appellant's property is more than adequate to keep appellee fully secured at all times appellee will suffer no substantial injury by a delay for a reasonable period in foreclosing on the property. It has been held that if a debtor has sufficient equity in its property to keep a secured creditor fully secured that the

secured creditor does not legally suffer any substantial injury by a reasonable delay under a restraining order.

In *In re Atlantic Steel Products Corporation,* 31 F. Supp. 418, at page 410, it is stated:

> "Clearly in the case at bar, the equities favor the debtor, because the value of the property is much greater than the amount of the chattel mortgage; therefore, the petitioner was not injured by the stay . . ."

Accord:

In re Brown (supra), 84 F. 2d 433, 434.

CONCLUSION

Appellant is fully qualified as a debtor under Chapter XI of the Bankruptcy Act. The Referee, sitting as the Bankruptcy Court, clearly has jurisdiction over appellant, and the property involved including jurisdiction, in his discretion, to enjoin foreclosure of liens on the property. The Referee's findings of fact, including the one that appellant has a substantial equity in its property, is more than adequately supported by substantial evidence. The granting or denying of appellant's petition for a restraining order is a matter that lies in the sound discretion of the Referee. The facts and equities of this case clearly support the granting of the stay order. The order of the Referee was by no means clearly erroneous and was not an abuse of the Referee's discretion. Appellant was entitled to the benefits provided for debtors by Chapter XI when it filed

these proceedings. It cannot be deprived of these benefits by appellee's conditional offer to loan or advance funds to it. Appellant should be granted a reasonable time to work out an arrangement to pay its creditors and not be forced to accept this advance and its proceedings dismissed so appellee can foreclose on its property.

Appellant respectfully submits that the District Court erred in reversing the order of the Referee restraining foreclosure proceedings by appellee and in remanding the matter to the Referee with instructions to determine the costs of administration and upon payment thereof, together with the amount of the unsecured debts, to dismiss the chapter proceedings, and appellant respectfully requests that this order of the District Court be reversed.

Dated, Fresno, California,
December 6, 1967.

W. A. McGugin,
Attorney for Appellant.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

W. A. McGugin,
Attorney for Appellant.

(Appendix Follows)

Appendix

Appendix

TABLE OF EXHIBITS

Exhibit		Identified and Offered Reporter's Transcript 12/27/66. Page	Received Reporter's Transcript 12/27/66. Page
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#4.	Respondent	38	40
#5.	Respondent	38	39
#6.	Respondent	41	42
#7.	Respondent	42	42
#8.	Respondent	67	69
#9.	Respondent	68	
#A.	Debtor	82	83
#B.	Debtor	82	83
#C.	Debtor	82	83
#D.	Debtor	82	83
#E.	Debtor (R.T. 1/5/67)	9-11	32

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